Filed 4/10/09 P. v. Sauermilch CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL EDWARD SAUERMILCH, Defendant and Appellant.	C058040 (Super. Ct. No. 06F08592)

Convicted of 13 counts of lewd conduct on a child under the age of 14, defendant Michael Edward Sauermilch appeals his conviction and his sentence. On appeal defendant claims the trial court erred in excluding evidence of the victim's subsequent sexual conduct and in imposing the upper term and consecutive sentences without a jury trial. Finding none of defendant's claims to have merit, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2007 defendant was charged with 13 counts of lewd conduct with children under the age of 14 involving his step-granddaughters, T. and J. It was further alleged that the

offenses were committed against more than one victim within the meaning of Penal Code section 667.61, subdivision (e)(5). Defendant pled not guilty to all charges.

Prior to trial, defendant filed a motion to present evidence of T.'s "MySpace" page pursuant to Evidence Code[1] section 782. The page reads, in pertinent part, as follows: "About me: [¶] hey my name is [t.]. i like to hang out. go shopping. go riden. n when i say that I mean riden my man. i can be a bitch at times. i can be nice to.. u can hate me or love me ill let u choose." Defendant argued this posting was relevant to show T.'s knowledge of sexual matters and thus her ability to lie about the alleged sexual abuse.

At the section 782 hearing, T. testified the page was hers. She explained that she and a friend put the page together the year before, when she was 14. Despite acknowledging that she wrote most of the information on the page, T. denied having written the line "n when i say that i mean riden my man." T. explained that the friend who helped create the "MySpace" page probably wrote that, that she too had access to the page. She claimed never to have seen that language on there before.

At the conclusion of the hearing, the court denied defendant's request to admit the evidence, finding it was irrelevant. The court reasoned that the page, created when T. was 14, was created more than two years after the last incident

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[1] All further statutory references are to the Evidence Code unless otherwise indicated.

of molestation, and thus had no bearing on T.'s character for lying or her sexual knowledge when she was seven years old, which was her age when the allegation of molestation first occurred. The court affirmed its ruling at the end of trial.

The jury found defendant guilty as charged. The court then sentenced defendant to an aggregate term of 149 years to life in state prison comprised of the following: the upper term of eight years on count two, the principal count; consecutive terms of 15 years to life on counts one, three through six, and ten through thirteen; and two years each on counts seven through nine. Defendant was given 561 days' credit for time served and a restitution fine was imposed. Defendant appeals his conviction and his sentence.

DISCUSSION

I

The Trial Court Properly Excluded Evidence Of T.'s Subsequent Sexual Conduct

A

Legal Standard Relating To Admission Of Prior Sexual Conduct For Purposes Of Attacking Credibility

Defendant asserts the trial court erred in denying defense counsel's motion to admit evidence of T.'s "MySpace" page. Defendant argues that statements made on T.'s "MySpace" page were evidence of T.'s "knowledge of sexual matters" and her tendency to lie about "matters relating to sexual conduct." Specifically, defendant contends the trial court, by excluding this evidence, violated his constitutional rights to a fair

trial and to present a defense. We find no error and no constitutional violations.

"A defendant generally cannot question a sexual assault victim about his or her prior sexual activity." (*People v. Bautista* (2008) 163 Cal.App.4th 762, 781, citing *People v. Woodward* (2004) 116 Cal.App.4th 821, 831.) An exception exists when evidence of the complaining witness's prior sexual history is "offered to attack the credibility of the complaining witness as provided in section 782." (§ 1103, subd. (c)(5).) "Evidence Code section 782 provides for a strict procedure that includes a hearing outside of the presence of the jury prior to the admission of evidence of the complaining witness's sexual conduct. [Citations.] Evidence Code section 782 is designed to protect victims of molestation from 'embarrassing personal disclosures' unless the defense is able to show in advance that the victim's sexual conduct is relevant to the victim's credibility. [Citation.] If, after review, 'the court finds the evidence relevant and not inadmissible pursuant to Evidence Code section 352, it may make an order stating what evidence may be introduced and the nature of the questions permitted.'" (*Bautista*, at p. 782.) "By narrowly exercising the discretion conferred upon the trial court in this screening process, California courts have not allowed the credibility exception in the rape shield statutes to result in an undermining of the legislative intent to limited public exposure of the victim's prior sexual history." (*People v. Chandler* (1997) 56 Cal.App.4th 703, 708.)

B

The Trial Court Did Not Err In Excluding Evidence

We review the trial court's ruling in denying the admission of T.'s "MySpace" page for an abuse of discretion. (*People v. Chandler*, *supra*, 56 Cal.App.4th at p. 711.) We will not disturb a court's exercise of its discretion "*except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) We are also mindful that the credibility exception to the inadmissibility of a complaining witness's prior sexual conduct should not "impermissibly encroach upon the rule itself and become a 'back door' for admitting otherwise inadmissible evidence." (*People v. Rioz* (1984) 161 Cal.App.3d 905, 918-919.)

On review, the trial court did not abuse its discretion in denying admission of T.'s "MySpace" page. As the trial court found, the "MySpace" page was created when T. was 14 years old, more than two years after the last incident of abuse. Accordingly, it is not evidence of her knowledge regarding sexual matters during the relevant time period. Nor are the "MySpace" musings of a 14 year old girl evidence of her character for engaging in sexual activity between the ages of 7 and 11. There was thus no error in excluding the evidence and, consequently, defendant was not denied his constitutional right to a fair trial.

II

The Trial Court Did Not Err In Sentencing Defendant

Defendant also contends that the upper term sentence imposed on count two contravenes the holdings of *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856] and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403]. Defendant is mistaken.

Defendant was sentenced after the Legislature amended section 1170 to give the trial court broad discretion to impose the lower, middle, or upper term by simply stating its reasons for imposing the selected term. As amended, the upper term, not the middle term, is the statutory maximum that may be imposed without additional fact finding. (*People v. Sandoval* (2007) 41 Cal.4th 825, 850-851.)

Here, the trial court imposed the upper term for the following reasons: "because the victims were particularly vulnerable due to their young age and also the Court finds that the defendant took advantage of a position of trust or confidence as he is the young girls' step-grandfather." Imposing the upper term for these reasons was well within the trial court's discretion. Because the upper term is now the statutory maximum, the trial court did not violate defendant's Sixth Amendment rights when it sentenced him to the upper term.

Defendant's final contention is that his consecutive terms were imposed in violation of his rights to a jury trial and due process. His argument is foreclosed by the California Supreme Court's decision in *People v. Black* (2007) 41 Cal.4th 799, 821-

823, and the recent decision of the United States Supreme Court in *Oregon v. Ice* (2009) ___ U.S. ___ [172 L.Ed.2d 517].

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

HULL, J.